Center for National Security Studies

M E M O R A N D U M September 12, 1984

TO: Mort Halperin and Ira Glasser

FROM: Allan Adler

RE: Memorandum By James H. Lesar Regarding H.R. 5164

This memorandum responds to statements made by James Lesar in his September 6, 1984 memorandum regarding H.R.5164. Insofar as Mr. Lesar's memorandum addresses the provisions in H.R.5164 that specifically concern judicial review, reference should be made to Mark Lynch's September 7, 1984 memorandum in response to similar statements in memoranda by Meir Westreich. Mr. Lesar's other salient statements regarding H.R.5164 are addressed as follows:

Mr. Lesar: "Because H.R.5164 neither limits how long the CIA may impose secrecy on its 'operational' files nor guards against their destruction, scholars may never be allowed access to many of the most important materials documenting CIA activities."

Response: H.R.5164 concerns whether the CIA must search and review certain "operational" files, not whether the agency must permit public access to materials within them. The CIA already has the authority to "impose secrecy" on its "operational" files because most of the materials within them invariably fall within FOIA exemptions that authorize the agency to withhold classified information and information about intelligence sources and methods. Neither Executive Order 12356 -- which is the basis for classification resulting in withholding pursuant to exemption 1 -- nor section 102(d)(3) of the National Security Act of 1947, 50 U.S.C. Sec.403(d)(3) -- which is the basis for invoking exemption 3 to prevent unauthorized disclosure of intelligence sources and methods -- prescribes limits on how long such materials can be kept secret. Indeed, regarding duration of classification, Section 1.4(a) of the Executive Order simply states that "[i]nformation shall be classified as long as required by national security considerations." While it is therefore true that "scholars may never be allowed access" to such materials, this would not be attributable to H.R.5164 because its provisions do not create any additional authority to deny access.

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With respect to destruction of files, the CIA, like other federal agencies, is already required to comply with provisions in Chapters 31 and 33 of Title 44 regarding records management and disposal. Failure to comply with these laws in connection with destruction of its records led to the FBI being enjoined from further destruction pending court approval of a program meeting the statutory requirements. American Friends Service Committee v. Webster, 485 F.Supp. 222 (D.D.C. 1980). Moreover, it seems unlikely that the CIA would need to destroy records in order to deny public access to them; they have been exceedingly successful in utilizing the withholding authority presently available to them by law.

Mr. Lesar: "H.R.5164 may set a precedent that will allow still other agencies to obtain similar exemptions from the Freedom of Information Act."

Response: It is highly improbable that H.R.5164 would become a model for similar legislation to provide FOIA "relief" for any other federal agency, primarily because it is so specifically tailored to the administrative problems arising from the CIA's compartmented filing system. In an exchange with Rep. Kleczka during the House Government Operations subcommittee hearing on H.R.5164 in May, the Deputy Director of the CIA's Office of Legislative Liasion explained that the CIA had discussed FOIA problems with other intelligence agencies and "found, after extensive discussion, examination of their system, that their problems were different and although they certainly do have problems with the FOIA, it was not fixable in the way we do it here." CIA Information Act: Hearing on H.R.5164 Before A Subcommittee of the House Committee on Government Operations, 98th Cong., 2d Sess. 33-34 (1984).

Moreover, the CIA itself told the Senate Intelligence Committee that there was no "hidden agenda" for other intelligence agencies to seek further FOIA "relief" following enactment of the CIA legislation. This was reflected in the committee report in the "Additional Views of Senators Durenberger, Huddleston, Inouye, and Leahy" -- the four senators who successfully fought for committee amendments to protect the public's right of access in the context of this legislation:

> "As important as the bill, the report, and related assurances and commitments is the prospect that passage of the Intelligence Information Act will make it unnecessary for the Congress to consider further requests for broader exemptions from the FOIA for intelligence records. Deputy Director of Central Intelligence John N. McMahon testified at

> the hearings on S.1324 that proposals for broader intelligence exemptions from the FOIA 'would not be sanctioned' by the Administration. The Committee report cites the Chairman's communication with the President in which the President indicated his support for the approach taken in S.1324. Thus, we do not envision a need for further legislation in this area for the foreseeable future." S.Rpt. 98-305, p.40.

Agencies, such as the FBI, which have long sought FOIA "relief" from Congress will undoubtedly continue to do so regardless of the fate of H.R.5164. Whether Congress will be disposed to provide requested "relief" will depend upon the merits of the request, not upon any "precedent" purportedly set by action on H.R.5164.

Mr. Lesar: "H.R.5164 has sped through Congress on greased skids... Scant public attention has been given the bill, perhaps in part due to an assumption that the ACLU's position fully and adequately represents the interest of all segments of the public."

Response: There is nothing out of the ordinary with respect to the legislative progress of H.R.5164. Its predecessor in concept, S.1324, was the subject of two days of hearings in June 1983 before the Senate Intelligence Committee. S.1324, An Amendment to the National Security Act of 1947: Hearings Before the Senate Select Committee on Intelligence, 98th Cong., 1st Sess. (1983). With substantial modifications, the Committee approved the bill in October 1983 and filed a detailed report (H.Rpt. 98-305) explaining its intent. S.1324 was passed by voice vote in the Senate on November 17, 1983. In February of this year, the House Intelligence Committee held a hearing to consider similar legislation which had been introduced in June 1983. Legislation to Modify the Application of the Freedom of Information Act to the Central Intelligence Agency: Hearing Before the Subcomm. on Legislation of the House Permanent Select Committee on Intelligence, 98th Cong., 2d Sess. (1984). Following extensive modifications, the Committee approved H.R.5164 as a clean bill in April of this year and filed an explanatory report (H.Rpt. 98-726, Part 1) in May. The House Government Operations Subcommittee on Government Information, Justice and Agriculture -- which had joint jurisdiction over H.R.5164 with the Intelligence Committee -- held a hearing on the bill on May 10. (See CIA Information Act: Hearing, supra). With further amendment, H.R.5164 was subsequently approved by the full House Government Operations Committee, which filed its report (H.Rpt. 98-726, Part 2) last week.

Numerous interested parties in addition to the ACLU and the CIA made their views known during the course of this legislative process. If, as Mr. Lesar asserts, some parties assumed that the ACLU's position represented the interests of all segments of the public, this was an unfortunate assumption which was neither fostered nor desired by the ACLU. ACLU legislative staff in Washington both sought and accepted any available opportunity to discuss the legislation with interested parties, particularly those who expressed criticism of our public statements on the bill. Indeed, ACLU legislative staff met in January of this year with Mr. Lesar and one of his clients in an FOIA/CIA suit to discuss upcoming consideration of the legislation by the House committees.

Several articles tracking the progress of the legislation and the accompanying debate appeared in The New York Times, The Washington Post, and other major papers. Indeed, a running debate over the merits of the legislation as viewed by the ACLU and others played across the pages of several issues of The Nation magazine. In addition, meetings were held in New York and Washington to permit representatives of various organizations to discuss the legislation with ACLU staff. Documents previously released by the CIA under the FOIA were solicited by the ACLU to determine what impact the proposed legislation would have on the same materials.

In short, it is difficult to understand what more Mr. Lesar would have wanted done to encourage public attention regarding H.R.5164.

Mr. Lesar: "Each of [the CIA components containing "operational files"] is known to have engaged in illegal and reprehensible activities."

Response: This, of course, is well-known to the ACLU, which has litigated many of the FOIA cases that revealed the details of such activities. However, past illegal conduct by the CIA is not an argument against enactment of H.R.5164; rather, it is an argument in support of the ACLU's successful effort to insure judicial review and Congressional oversight with respect to the CIA's actions and commitments regarding its FOIA processing if H.R.5164 is enacted.

Moreover, H.R.5164 would not facilitate any effort on the part of the CIA to hide records which document illegal activities because, as the report of the House Intelligence Committee explains, paragraph 701(c)(3) of the bill "ensures that operational files will remain subject to FOIA search and review requirements for information concerning the specific subject

matter of an investigation for any impropriety or illegality in the conduct of an intelligence activity. Thus, such information will remain fully subject to FOIA search, review, and disclosure requirements in the same manner as if subsection 701(a) [exempting certain files from search and review] were never enacted. H.Rpt. 98-726, Part 1, p.28.

The committee report explains that allegations of impropriety or illegality in the conduct of an intelligence activity "may originate either inside or outside" the CIA; allegations which arise inside the CIA "are never dismissed without some recorded inquiry." Allegations made by persons outside the Agency "will be deemed frivolous and closed without any investigation only where the writer has sent previous letters and the allegation is preposterous on its face; if CIA's records reflect that the Agency has had contact with the individual making the allegation and the individual is not a prior correspondent of known frivolity, the allegation is never determined to be frivolous." Id. at 28-29.

Mr. Lesar: With regard to the "investigation" exception to the operational files exemption, i.e., paragraph 701(c)(3), "[t]here is no mention of Presidential commissions, and as it pertains to Congress, the list is restricted to 'the intelligence committees of Congress' only. The investigations of the Rockefeller Commission and the House Select Committee on Assassinations do not come within the purview of this exception. Nor would the investigation of the Patman Committee into the laundering of funds in the Watergate scandal be included."

Response: The absence of specific mention of the investigative bodies cited by Mr. Lesar does not present serious problems because these bodies, like any other person inside or outside of the CIA, can trigger an investigation by one of the listed investigative bodies and thereby still make operational files concerning the specific subject matter of such investigation undergo full search and review pursuant to an FOIA request. See H.Rpt. 98-726, Part 1, p.28-31. Whether such investigations turn out to be "cover-up type inquiries" as suggested by Mr. Lesar will not affect the CIA's obligation to search for documents which concern the specific subject matter of an investigation, no matter how shoddy the investigation may be.

Mr. Lesar: Problems with the meaning of "specific subject matter of an investigation", "impropriety", and "intelligence activity".

Response: These terms and phrases are explained in detail in the report of the House Intelligence Committee cited immediately above. Mr. Lesar offers no valid illustration in support of his contention that the report language is inadequate. Moreover, any dispute over interpretations can be pursued in court where agency actions will remain subject to de novo judicial review in accordance with current FOIA law. See H.Rpt. 98-726, Part 1, p.33 ("Matters not addressed by [the bill's seven procedural exceptions to de novo review] will continue to be decided in accordance with subparagraph 552(a)(4)(B) of title 5 and case law thereunder which the courts have developed and may in the future develop in light of reason and experience.")

Mr. Lesar: With respect to Section 701(c)(3), "this proviso fails to provide historians, journalists and scholars with access to operational files which do not involve illegality or impropriety, but which nonetheless document activities of interest to the public."

Response: True, but they do not obtain such access under current law. As Mr. Lesar himself notes, the "balancing test" of President Carter's Executive Order 12065 is no longer available and was unavailing even when it was law. See Afshar v. Department of State, 702 F.2d 1125 (D.C.Cir. 1983). Still, as noted in both House committee reports, H.R.5164 will not affect the CIA's obligation to search and review (1) all intelligence disseminations, including raw intelligence reports direct from the field; (2) all matters of policy formulated at Agency executive levels, even operational policy; (3) information concerning those covert actions the existence of which is no longer classified; (4) information concerning U.S. citizens and permanent resident aliens requested by such individuals about themselves; and, (5) information concerning any Agency intelligence activity that was improper or illegal or that was the subject of an investigation for alleged illegality or impropriety.

Mr. Lesar: "Review Every Ten Years, Release Never... any public benefit to be gained from [Section 702 on Decennial Review of Exempted Operational Files"] depends on a profound change in the CIA's own attitudes and practices..."

Response: H.R.5164 does nothing to diminish the historical value review that is required pursuant to Title 44, nor does it weaken the declassification review available pursuant to Executive Order 12356. Insofar as CIA will perform its responsibilities to scholars and historians, only dedicated Congressional oversight can make a true difference. Commitment

toward that goal is repeated throughout the legislative history of H.R.5164. It will be up to the press and the public to see that Congress lives up to its promise of oversight.

Mr. Lesar: "Recent events do not suggest that the CIA is worthy of the trust H.R.5164 exudes."

Response: Again, H.R.5164 does not depend upon trusting the CIA; this is precisely why the ACLU insisted upon judicial review and Congressional oversight to make H.R. 5164 work.

Mr. Lesar: Is CIA Backlog Self-Created?

Response: It is true, as Mr. Lesar notes, that the CIA has often employed an "arsenal of obstructionist tactics to delay and impede access to information." Nevertheless, the congressional committees that considered this legislation examined the CIA's filing and FOIA processing systems and found the CIA's explanation of its backlog credible, as have most of the courts.

Mr. Lesar: Will H.R.5164 result in a loss of meaningful information?

Response: Mr. Lesar's suggestion that "fundamental issues regarding the exemption claims [CIA] primarily relies upon have yet to be definitively resolved" is wholly untenable. A review of decisions by the U.S. Court of Appeals for the D.C. Circuit indicates that the parameters of CIA authority to withhold information requested under the FOIA are well-established indeed. See, e.g., Miller v. Casey, 730 F.2d 773 (D.C.Cir. 1984); Gardels v. CIA, 689 F.2d 1100 (D.C.Cir. 1982); Military Audit Project v. Casey, 656 F.2d 724 (D.C.Cir. 1981); Allen v. CIA, 636 F.2d 1287 (D.C.Cir. 1980); Halperin v. CIA, 629 F.2d 144 (D.C.Cir. 1980); Ray v. Turner, 587 F.2d 1187 (D.C.Cir. 1978).

Moreover, the notion that the federal courts are soon to favor FOIA requesters with narrow interpretations of the exemptions relied upon by the CIA makes no sense in light of Mr. Lesar's statement that "[t]o anyone familiar with the CIA's Freedom of Information Act track record and the timidity of federal judges confronted with the task of evaluating claims that disclosure will jeopardize national security, it is virtually certain that [the judicial review provisions of H.R.5164] will ultimately prove to be meaningless." Indeed, a chronological review of the decisions of the U.S. Court of Appeals for the D.C. Circuit cited above indicates that a clear trend toward greater, rather than

lesser, judicial deference toward CIA claims continues to this day and will probably expand under President Reagan's conservative judicial appointees. Only the active and willing involvement of Congress in performing oversight of the CIA's FOIA operations, pursuant to a thorough understanding of those operations, offers hope of improved response to FOIA requesters. This nas been made possible for the first time by process leading to enactment of H.R.5164.

Finally, with reference to David Sobel's example of information lost in the context of Vaughn indices, it would be disingenuous to insist that this was not a rare exception to the typical FOIA requester's experience with "boilerplate" CIA indices that are virtually indistinguishable on a case-to-case basis. Conceding that cases like Sobel's can arise, we nevertheless believe that improved processing of FOIA requests, together with the commitment for informed Congressional oversight, is much more important than marginal scraps of information produced as a byproduct of litigation over such requests.

Mr. Lesar: "The failure to include a provision for attorney's fees [in H.R.5164] is simply astounding... Without an attorney's fees provision, this bill is unenforceable."

Response: An attorney fees provision was not included in H.R.5164 for the simple reason that the attorney fees provision in the FOIA, Section 552(a)(4)(E), is fully applicable to actions involving the provisions of H.R.5164. The report of the House Intelligence Committee makes clear that paragraph 701(f)(6), providing that a court order to search and review exempted operational files shall be the exclusive remedy for CIA failure to comply with the main provisions of H.R.5164, "of course, does not affect the court's authority under the Freedom of Information Act to assess reasonable attorney fees, to punish for contempt, or to handle other, similar ancillary matters." H.Rpt. 98-726, Part 1, p.35-36.